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Midwest Terminals of Toledo International, Inc. and International Longshoremen's Association, Local 1982, AFL-CIO and Don Russell. Cases 08-CA-135971 and 08-CA-136613

October 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On April 19, 2016, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There were no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) of the Act by denying employee Don Russell placement on the skilled list, and by disciplining and discharging him, and Sec. 8(a)(1) by disparately applying its cell phone/mobile device policy to discriminate against Union adherents.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by discriminatorily denying employee Fred Victorian, Jr. placement on the skilled list. In finding antiunion animus, the judge relied on evidence that Respondent Director of Operations Terry Leach threatened Victorian by stating in a raised voice, "I'm about this far off your ass," when Victorian and other employees challenged the Respondent's unilateral decision to use Teamsters-represented employees to load aluminum. We agree with the judge's analysis and additionally rely on the Respondent's other contemporaneous unfair labor practices found in *Midwest Terminals of Toledo International, Inc.*, 365 NLRB No. 134 (2017) (discriminatorily discharging Union President Otis Brown and threatening and discriminatorily denying Union Vice President Prentis Hubbard pay). We also rely on the Respondent's unfair labor practices found in *Midwest Terminals of Toledo International, Inc.*, 362 NLRB No. 57 (2015) (threatening not to hire employees because they filed grievances under the collective-bargaining agreement and unfair labor practice charges with the Board; threatening an employee with future discipline because he filed a grievance; coercively telling employees that the Union had caused them to lose overtime; threatening to remove from the job or discharge an employee because he engaged in union and protected concerted activity; and grabbing an employee because he engaged in union and protected concerted activity). See, e.g., *St. George Warehouse, Inc.*, 349 NLRB 870,

and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Midwest Terminals of Toledo International, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the International Longshoremen's Association, Local 1982 (the Union) and giving it an opportunity to bargain.

(b) Denying placement on the skilled list or otherwise discriminating against employees for supporting the Union or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union

878 (2007) (relying on unfair labor practices found in prior case to find that subsequent discipline was motivated by union animus); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203 (2007) (animus inferred from unlawful threat of reprisal to the discriminatee), enfd. 519 F.3d 373 (7th Cir. 2008). However, we disagree with our concurring colleague's view that animus evidence must be "particularized" to a discriminatee's own protected activity. See *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 1 fn. 1 (2015) (Under *Wright Line*, "proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make a particularized showing of animus towards the disciplined employee's own protected activity.").

Although Chairman Miscimarra agrees with his colleagues that the Respondent violated Sec. 8(a)(3) by failing to place Victorian on the skilled list, he relies exclusively on Leach's threatening remark to Victorian as evidence of animus; he does not rely on any evidence of the Respondent's contemporaneous unfair labor practices. In the Chairman's view, *Wright Line* requires "a particularized showing that links an employee's protected activity to the adverse employment action taken against that employee" See *Commercial Air, Inc.*, supra, 362 NLRB No. 39, slip op. at 1 fn. 1 (Member Miscimarra, concurring). Accordingly, he does not agree with the judge's phrasing of the third element of the *Wright Line* prima facie case as requiring a showing that the Respondent "harbored animosity towards the union or other protected activity."

² In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall include the requisite tax compensation and Social Security reporting remedy, and shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change and to conform to the violations found and the Board's standard remedial language. We do not rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), cited in the judge's remedy.

as the exclusive collective-bargaining representative of employees in the following bargaining unit:

[E]mployees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders . . . [but not] office, clerical, professional and supervisory and security employees.

(b) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in April 2014 concerning the criteria for inclusion on the skilled list and the established practice of meeting with the Union to discuss and confer before selecting employees to add to the skilled list.

(c) Make Don Russell and the estate of Fred Victorian, Jr. whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to place them on the skilled list, in the manner set forth in the remedy section of the judge's decision as modified herein.

(d) Compensate Don Russell and the estate of Fred Victorian, Jr. for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Toledo, Ohio facility, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily

communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 11, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the International

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Longshoremen's Association, Local 1982 (the Union) and giving it an opportunity to bargain.

WE WILL NOT deny placement on the skilled list or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

[E]mployees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders . . . [but not] office, clerical, professional and supervisory and security employees.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented in April 2014 concerning the criteria for inclusion on the skilled list and the established practice of meeting with the Union to discuss and confer before selecting employees to add to the skilled list.

WE WILL make Don Russell and the estate of Fred Victorian, Jr. whole for any loss of earnings and other benefits suffered as a result of our failure to place them on the skilled list, plus interest.

WE WILL compensate Don Russell and the estate of Fred Victorian, Jr. for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

MIDWEST TERMINALS OF TOLEDO
INTERNATIONAL, INC.

The Board's decision can be found at www.nlr.gov/case/08-CA-135971 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Gina Fraternali, Esq. and Cheryl Sizemore, Esq., for the General Counsel.

Ronald L. Mason, Esq. and Aaron T. Tulencik, Esq., of Dublin, Ohio, for the Respondent.

Otis Brown, of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Bowling Green, Ohio, on June 8 to 11, 2015, and in Cleveland, Ohio, on July 28, 2015. The International Longshoremen's Association, Local 1982, AFL-CIO (the Union or Local 1982), filed the charge in case 08-CA-135971 on September 4, 2014, and an amended charge on November 28, 2014. Don Russell, an individual, filed the charge in case 08-CA-136613 on September 12, 2014, and amended charges on October 28 and November 28, 2014. The Acting Regional Director for Region 8 of the National Labor Relations Board (the Board) filed the Consolidated Complaint (the complaint) on December 31, 2014. The complaint alleges that Midwest Terminals of Toledo International Inc. (the Respondent) committed various violations with respect to the addition of employees to its list of skilled employees. Specifically, with respect to the skilled list, the complaint alleges that since about April 1, 2014, the Respondent has: violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing the criteria for inclusion on the skilled list and by ceasing to meet to discuss and confer with the Union regarding the selection of employees for the skilled list; and violated Section 8(a)(3) and (1) of the Act by discriminatorily denying Don Russell and Fred Victorian Jr. (F. Victorian) placement on the list of skilled employees. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by discriminatorily disciplining Russell on April 23, June 30, and July 10, 2014, and terminating him on August 23, 2014. In all but one of these instances, the Respondent states that its actions were based on Russell's violation of a policy prohibiting employees from using cell phones or other mobile devices while operating equipment. With respect to that cell phone/mobile device policy, the complaint also alleges that since at least June 20, 2014, the Respondent has violated Section 8(a)(1) by disparately applying the policy only against employees who engaged in union activity. The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations.

On February 25, 2015, the General Counsel filed a motion to consolidate the instant cases with two other cases pending before me involving the same Union and Respondent (Cases 08-CA-119493 and 8-CA-119535) and with respect to which the

trial had already been underway for 7 days.¹ Arthur J. Amchan, Deputy Chief Administrative Law Judge, issued an order on March 20, 2015, denying the motion to consolidate the instant cases with the earlier-filed cases, but directing me to consider the record in the earlier cases when deciding the instant cases. The order stated, *inter alia*, that I “may, for example, take into account [my] credibility resolutions drawn from the record of the” earlier-filed cases when deciding the allegations in the instant cases. I issued my decision in the earlier-filed cases on January 21, 2016. See 2016 WL 275278, JD-04-16 (*Midwest Terminals I*).²

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides stevedoring services at its facility in Toledo Ohio. From these activities, the Respondent derives annual gross revenues in excess of \$500,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Since 2004, the Respondent has provided stevedoring and warehousing services at the Port of Toledo in Toledo, Ohio. Its work includes unloading and loading cargo vessels, railcars and trucks, and moving cargo to and from warehouses. The Respondent and its predecessors at the port facility have a decades-long bargaining history with the Union. The most recent collective-bargaining agreement between the Respondent and the Union³ covered, by its terms, the period from January 1, 2006, to December 31, 2010. At the time of the hearing, and of all the alleged violations, the Respondent and the Union continued to be bound by the terms of this expired agreement. To do their work, the bargaining unit workers operate a variety of types of equipment, including chutes, forklifts, end loaders, and cranes. As of April 2014, there were approximately 36 individuals in the bargaining unit.

¹ Cases 08–CA–119493 and 8–CA–11953 were tried: in Cleveland, Ohio, on December 1, 2, and 3, 2014; in Toledo, Ohio, on January 27, 28, 29, and 30, and April 7, 8, and 9, 2015; and in Bowling Green, Ohio, on April 20, 2015.

² I refer to pages from the transcript in *Midwest Terminals I* as “Tr. (I)” and to pages from the transcript in the subsequent trial as “Tr. (II).” The exhibits from *Midwest Terminals I* are designated using numbers – for example, GC Exh. 1 and R Exh. 1. The exhibits from the subsequent trial are designated using letters – for example, GC Exh. A and R Exh. A.

³ That collective bargaining agreement recognizes the Union as the representative of a unit comprised of “employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders.”

From approximately April 2010 to July 2012 the Union local was placed in trusteeship. During the trusteeship period, officials of umbrella labor organizations served as the trustees of the Union. In July 2012 local leadership took control of the Union local back from the trustees. Otis Brown, who had been working at the facility since 2001, became the new president of the Union local at that time.

B. Previous Decisions

Case 08–CA–038092 et al: On March 31, 2015, the Board affirmed the decision of Administrative Law Judge Mark Carissimi in a case involving the same Respondent and Union involved in the instant case. See *Midwest Terminals of Toledo Int’l*, 362 NLRB No. 57 (2015). That decision included a finding that the Respondent had unlawfully discriminated against Brown by denying him work assignments. Judge Carissimi found, *inter alia*, that Terry Leach—the Respondent’s director of operations—had lied about his reasons for denying work assignments to Brown and that the real reason was discrimination in violation of Section 8(a)(3) and (1). Among the other findings was that Leach had made an antiunion threat and physically assaulted a union steward because of his union and/or protected concerted activity.

In the case before Judge Carissimi, the General Counsel also alleged that the Respondent had discriminated against Russell (among others) in violation of Section 8(a)(3) and (1) of the Act by refusing to hire him in April and May 2009. Judge Carissimi found that the General Counsel had failed to prove that the Respondent unlawfully discriminated against Russell and the Board affirmed that finding. 362 NLRB No. 57, slip op. at 1 and 13–14.

Case 08–CA–119493 et al: On January 21, 2016, I issued a decision regarding the same Respondent and Union involved here.⁴ See *Midwest Terminals I*. Consistent with Judge Amchan’s March 20 order, I have taken into account the credibility determinations and record in that case in deciding the instant case. In the earlier case, I found that the Respondent discriminatorily discharged Brown, president of the Union local, in violation of Section 8(a)(3) and (4) of the Act because of Brown’s union activities and participation in the Board’s processes. I also found that the Respondent had unlawfully threatened union steward Prentis Hubbard and discriminatorily denied him pay to which he was entitled, and had repeatedly made unlawful unilateral changes to unit members’ terms and conditions of employment in violation of Section 8(a)(5).

In the same decision, I found that the General Counsel had failed to prove any of the alleged violations concerning the Respondent’s treatment of Russell. Specifically, the General Counsel did not show that the Respondent had unlawfully restricted Russell’s movements around the facility, that it had had unlawfully threatened Russell with discharge, or that it had discriminated by issuing written discipline to him for insubordination, leaving his job, and failing to begin work promptly and/or return to work promptly from meal periods. The evidence showed that Russell had a tendency to disappear at the

⁴ Exceptions to my decision in that case have been filed and are currently pending before the Board.

facility when he had work to perform and sometimes resisted the Respondent's orders to return to work. The testimony, including Russell's own, showed that Russell significantly exaggerated the level of freedom that his status as a fill-in union steward afforded him to leave his work duties during working time.

With respect to credibility, I found in my prior decision that two of the most important witnesses in the instant case—Russell as a witness for the General Counsel and Leach as a witness for the Respondent—were unusually unreliable. See *Midwest Terminals I*, at Page 4 footnote 3 (Leach) and Page 30 footnote 19 (Russell). Nothing that occurred when these individuals returned to the witness stand in June and July 2015 has caused me to reconsider those assessments. As he had during his previous testimony, Russell on several occasions reacted to attempts to impeach him with the record of his prior sworn testimony by implausibly claiming that the transcript or affidavit was a “misprint” or inaccurately recorded his prior testimony. (See, e.g., Tr. (II) 240, 243, 247.) Other aspects of his testimony were inconsistent with the documentary evidence. For example, he testified that he was not a cell phone “texter,” but his cell phone records were subsequently introduced at trial and show that he had a cell phone on which he sent and received text messages on a regular basis. Compare (Tr.(II) 99–100 and R Exh. VV); see also (Tr.(II) at 889) (when ship's mate accused Russell of “playing with” his cell phone instead of attending to his work, Russell responded by claiming that he did not even own a cell phone).

Likewise Leach, who had been evasive and self-contradictory in his earlier testimony, continued to exhibit those tendencies when he took the stand in June and July 2015. For example, he denied that the Respondent's and Union's practice had been to meet at the start of the shipping season to agree on the employees to include on the core list of skilled employees. However, in his testimony in the case before Judge Carissimi, Leach testified that at the start of the shipping season the Union and management had to jointly agree on the core list of skilled employees and other elements of the order of call list. After being confronted with his prior testimony, Leach grudgingly allowed that when there is an opening on the skilled list “we discuss it with the union.” (Tr. (II) 46–50.) In my prior decision, I found Hubbard and Brown, two witnesses for the General Counsel, to be particularly credible witnesses, and the record in the current case has not led me to reconsider those assessments. I also found Brad Hendricks and Christopher Blakely, two witnesses for the Respondent, to have been generally reliable witnesses, and I continue to view their testimony in that light.

C. Skilled List

1. Qualifications

The Respondent maintains a document referred to as an “order of call,” which lists the unit employees and indicates their relative seniority and notes whether each employee is qualified to perform certain types of work. The order of call is divided into a number of separate lists—including one of skilled employees and one of regular employees. The employees on the skilled list generally work on a daily basis during the shipping

season. In 2014 there were eight to ten employees on the skilled list. The regular list employees are only offered work when no skilled list employees are available who have the appropriate qualifications. The collective-bargaining agreement states that a regular list employee is eligible for placement on the skilled list if he or she becomes qualified in at least four out of the following five areas: crane operator, checker, power operator (forklift and/or end loader), signal person, and hatch leader.

Two of the areas of qualification—signal person and hatch leader—are disputed in this case and are relevant to assessing the allegations regarding the Respondent's decisions about who to add to the skilled list in April 2014. The signal person provides assistance to the crane operator, but does so from a vantage point outside the crane. The evidence shows that the Respondent had at one time provided its own signal training and decided for itself whether an employee was qualified to be a signal person. However, in 2010 the Respondent began using new cranes, known as Liebherr cranes, which were owned by the Port of Toledo rather than by the Respondent itself.⁵ The Port of Toledo required that employees who operated these cranes be certified by the National Commission for the Certification of Crane Operators (NCCCO). Subsequently, the Respondent sent a number of individuals for training and testing to become NCCCO certified as crane operators and signal persons. Those that passed the NCCCO signal training were eligible to receive an “SG” (uppercase) designation on the order of call, meaning that they were qualified to signal for any of the cranes used by the Respondent, including the Liebherr cranes. Those who the Respondent had previously determined were qualified as signal persons, but either did not take the NCCCO test or took it and did not pass, received an “sg” (lowercase) designation on the order of call. The Respondent considers an employee who receives the lowercase designation on the order of call qualified in that area for purposes of meeting the requirements for skilled list eligibility.⁶

⁵ Since 2010, the Respondent has been phasing out its use of the older cranes—referred to as gantry cranes and lucas cranes—and it appears that the Respondent has not used any of those older cranes since early in 2014.

⁶ This is based on the testimony of Blakely, the Respondent's human resources manager. Tr.(II) 671–672. Leach contradicted Blakely, stating that persons who had the lowercase “sg” designation on the Respondent's order of call were qualified signal persons if they had never attempted the NCCCO training, but were no longer qualified signal persons if they had taken the NCCCO training and not passed the test. I credit Blakely's testimony on this point over Leach's. For the reasons set forth above, and in *Midwest I*, Leach was a particularly unreliable witness and a less reliable one than Blakely. Moreover, when asked to explain why it was that a previously qualified signal person who had never taken the NCCCO signaling training or test would be considered more qualified than a previously qualified signal person who had taken the NCCCO training, but not passed the test, he did not provide any explanation. Rather he responded, “That would be a good question to ask OSHA.” Tr.(II) 814. Neither Leach nor any other witness provided evidence that OSHA had taken actions or made pronouncements that supported or explained Leach's position. Based on Leach's testimony, demeanor and the record as a whole, I find Leach's testimony on this subject to be self-serving and not credible.

The other contested qualification is “hatch leader.” The hatch leader is a bargaining unit employee assigned to act as the lead person for a team of eight to fifteen unit employees who are emptying or loading the hatch of a vessel. There is no formal training for the hatch leader position. Hatch leaders are chosen based on their experience and ability to command the respect of other employees. Unlike all of the other qualifications relevant to eligibility for the skilled list, the Respondent does not report an employee’s qualification to perform the hatch leader assignment on the order of call. Indeed, the Respondent does not document who it considers a qualified hatch leader anywhere. Leach testified that if someone at the company wanted to find out whether an employee was a qualified hatch leader they would have to ask Leach himself. Neither the Respondent, nor any of the witnesses, explained why this particular qualification is treated with such secrecy.

2. Past Practice Regarding Addition of Employees to the Skilled List

The General Counsel argues that, pursuant to the collective bargaining agreement, seniority is one of the criteria for selecting the unit employees to be added to the skilled list and that only employees who possess at least four of the five relevant qualifications are eligible. The General Counsel also argues that the Respondent’s established practice until April 2014 was to meet with the Union to discuss and confer regarding the selection of employees for addition to the skilled list. According to the General Counsel, the Respondent unlawfully departed from the contractual requirements and established practices when, in April 2014, it added Ricardo Canales and Joseph Victorian Jr. (J. Victorian) to the skilled list. The Respondent denies that it made any changes to the pre-April 2014, practices for selecting employees for the skilled list, and further argues that any changes it may have made occurred more than 6 months prior to the filing of the charges in this case and are therefore untimely pursuant to Section 10(b) of the Act.⁷

As alluded to above, the collective bargaining agreement provides that employees must be qualified in at least four of five designated areas in order to be eligible for placement on the skilled list. Section 5.2.1 of the collective-bargaining agreement states:

A. The Company shall employ a core group of employees experienced in longshoreman and warehousing work known as “skilled employees.” These employees will be qualified in four (4) or more of the following job classifications: crane operator, checker, power operator, signal man, and hatch leader.

The collective-bargaining agreement makes seniority one of the factors that the Respondent must consider when picking among eligible employees. Article 6 states:

6.2 For the purpose of this Agreement, qualifications, abilities and seniority shall be applicable and applied as follows:

A. To fill vacancies on the Skilled List.

⁷ Sec. 10(b) of the Act provides in part: “[N]o complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.”

* * *

C. If the qualifications and abilities of two (2) or more individuals are relatively equal, seniority will control.

The record shows that, although it is not set forth in the contract, the Respondent previously had a practice of meeting with the Union to discuss and confer over the selection of employees for the skilled list. Blakely, the Respondent’s human resources manager, testified that the Respondent and the Union had met to generate the skilled list in advance of the 2011 and the 2012 shipping seasons.⁸ He also testified that the Respondent had met with Union officials in 2013 to discuss the possible addition of an employee to the skilled list. Blakely also informed the Union, in writing, that the Respondent’s practice was, and long had been, to meet with the Union to discuss and confer prior to adding employees to the skilled list. In an October 30, 2012, written response to a grievance, Blakely informed the Union that:

The past practice, when filling vacancies on the Skilled List (as per CBA: 6. Seniority 6.3A) consistently employed by the company is to seek the union’s input prior to filling a Skilled List vacancy. This was true before ILA Local 1982 was placed in trusteeship on April 23, 2010, it was true during the 27-month trusteeship, and the practice remains the same since August 7, 2012 when the company was officially informed that ILA Local 1982 had emerged from trusteeship.

R. Exh. 139 (Step Two response to Grievance #2012–025). This account by Blakely was consistent with the understanding of Brown, the current president of the Union, although Brown himself had not had the opportunity to participate in any such discussions. I find that the established practice prior to April 2014 was for the Respondent to meet with the Union to discuss and confer before selecting employees to be added to the skilled list.⁹

⁸ At that time the Union was in trusteeship and was being represented for bargaining purposes by two union officials—John Baker Jr. and Andre Joseph—who were officers of larger longshoremen’s organizations with which the Union local had a relationship.

⁹ The trial in this matter closed on July 28, 2015, and the deadline for submission of briefs to me was, after an extension, October 20, 2015. On April 4, 2016, the Respondent filed a notice submitting what it described as “supplemental authority” to its post-hearing brief. The notice does not actually include any supplemental authority, but instead asks me to consider testimony obtained on December 3, 2015, in a separate unfair labor practices trial before a different administrative law judge, (Case No. 08–CA–152192), and which purportedly bears on the practices regarding the skilled list. On April 8, 2016, the General Counsel filed a motion to strike the Respondent’s notice of supplemental authority. The General Counsel noted, *inter alia*, that pursuant to Sec. 102.45(b) of the Board’s Rules and Regulations the Board has held it is appropriate to strike attempts to supplement the record with evidence that was not admitted into the evidence of the case being decided. See *Electro-Tec, Inc.*, 310 NLRB 131 fn.1 (1993), enf’d. 993 F.2d 1547 (6th Cir. 1993). Moreover, the Board has made clear that although it permits parties to submit “supplemental authority” after briefing, by “supplemental authority” it means case law citations, not testimony from other hearings. See *Reliant Energy*, 339 NLRB 66 (2003). The Respondent has not provided any authority permitting me

In reaching my finding regarding the past practice, I considered that, prior to April 2014 the two most recent potential additions to the skilled list had been special cases with respect to whom the consultation was somewhat unusual. The last person considered for the skilled list during that period was John Murphy in 2013. Murphy was a special case because it was unclear whether he was a bargaining unit employee. Prior to that, the parties last discussed the addition of an employee in 2011, when Brown was placed on the skilled list. The discussions between the Union and the Respondent were unusual in that instance because Brown, unlike many other regular list employees, was reluctant to join the skilled list and the Respondent was seeking the Union's assistance in persuading Brown to do so. Although the discussions in both of those instances had unusual wrinkles, it does not detract from the compelling evidence that, prior to April 2014, the Respondent had a practice of meeting with the Union to seek its input prior to selecting employees to add to the skilled list.

3. Employees Added to the Skilled List in April 2014

On April 27, 2014, the Respondent, for the first time since July 2011, added employees to the skilled list. The two individuals it added at that time were Canales and J. Victorian. The Respondent did not meet to confer with the Union about adding these, or other, individuals to the 2014 skilled list prior to doing so.¹⁰ At the time it added those individuals, the Respondent passed over Russell and F. Victorian. The record evidence regarding the union activities and respective qualifications of these individuals is discussed below.

Since November of either 2012 or 2013, Russell has acted as a fill-in union steward. (Tr.(I) 966-967.) As of April 27, 2014, when Russell was passed over for a spot on the skilled list, he was also a union trustee, a member of the safety committee, and, since November 2013, a union dispatcher. In fulfilling these duties Russell, *inter alia*, filed grievances, and brought contract violations and safety concerns to the Respondent's attention.¹¹ In addition, on at least two occasions, Russell has

consider such testimony, nor does it provide a basis for believing that the witness involved was not available to testify prior to the close of the trial before me. I agree with the General Counsel that the Respondent's notice is improper and hereby strike the Respondent's April 4, 2016 filing.

¹⁰ Previously, in a letter dated September 10, 2013, the Union had asked Blakely to suggest dates when the parties could meet to discuss filling vacancies on the skilled list. Blakely, responded in a letter dated September 16, 2013, which did not suggest any dates or agree to meet. R Exh. T. Rather Blakely stated that Canales was the only regular list employee qualified for placement on the skilled list, but that Canales was not interested in the position. *Id.* In the same letter Blakely asserted that J. Victorian had previously been on the skilled list, but that due to a break in service he was not presently qualified. At about the same time as the Respondent provided the Union with this statement regarding employees' eligibility for the skilled list, the Respondent submitted a position statement in which it took the contrary position that not a single unit employee had the qualifications necessary for placement on the skilled list. Tr. (II) 612-613.

¹¹ One such occasion occurred on June 27, 2014, when Russell informed Leach that employees were cleaning sugar out of the hold of a ship in a manner inconsistent with safety standards. Leach agreed, and proposed a solution that Russell believed was still unsafe. Leach sub-

complained to Blakely that he had not been properly paid for his hours, but in each instance Blakely reviewed the matter and concluded that the Respondent had paid Russell properly.

Regarding qualifications for the skilled list, I find that Russell was the most senior employee on the regular list who was eligible for placement on the skilled list. The order of call list for April 24, 2014, shows that Russell had the second most seniority of anyone on the regular list and more than either Canales or J. Victorian at the time the Respondent added those individuals to the skilled list. The only regular list employee with more seniority than Russell was Raymond Sims – an individual who did not meet the skilled-list eligibility requirements. The Respondent's April 24, 2014, order of call shows that Russell was qualified as a signal person,¹² a checker, and a power operator (forklift). In addition, Russell was a qualified hatch leader, thus giving him four relevant areas of qualification and making him eligible for the skilled list. As discussed above, unlike the other areas of qualifications, the Respondent does not document whether an employee is a qualified hatch leader. The record showed, however, that the Respondent assigned Russell to the hatch leader position in 2009 and/or 2010 and Brown credibly testified that the persons who the Respondent assigned to that position were considered qualified hatch leaders. Russell also testified that he was a qualified hatch leader. In reaching the finding that Russell was a qualified hatch leader in April 2014, I considered that when Leach was asked whether Russell was qualified he answered, "I don't know that I would consider him qualified." It is not clear that Leach meant this as a denial that Russell was a qualified hatch leader, but to the extent that it is a denial it is, at best, an uncertain one. Moreover, Leach is a witness with a demonstrated tendency to give self-serving, unreliable, testimony. His suggestion that Russell was not a qualified hatch leader even though he had been assigned to do that work was not corroborated by other credible testimony or documentary evidence, and was outweighed by the evidence that Russell was also qualified.

F. Victorian was appointed as a union steward in 2012 or 2013 and elected as a union steward in 2014. During the time period at issue here, he was the Union's financial secretary, a union trustee, and filed grievances. On one occasion in June 2013, F. Victorian challenged Leach about the unlawful assignment of Longshoremen's unit work to Teamsters-represented employees. See *Midwest I* at pages 26-27. At that time, Leach raised his voice and warned F. Victorian "I'm

subsequently arranged for a solution that the Union did not object to. I do not find that the credible evidence shows that this process was heated or otherwise demonstrated animus on the part of Leach. In addition, Russell testified that on two occasions shortly before his termination on August 23, 2014, he brought what he believed to be contract violations to the Respondent's attention—one in which Russell said that a supervisor or maintenance employee was doing bargaining unit work and another in which Russell and Hendricks disagreed about whether there was additional work for Russell to perform. The record in this case shows that such exchanges between employees and management were routine at the facility and does not show that the ones engaged in by Russell were heated or otherwise suggestive of animus.

¹² I base this on the Respondent's placement of a lowercase "sg" next to Russell's name on the order of call. See, *supra*, fn. 6.

about this far off your ass.” Id. On June 5, 2012, F. Victorian requested, in writing, that the Respondent place him on the skilled list. The Respondent did not do so. The evidence shows that as of April 1, 2014, F. Victorian was the fourth most senior employee on the regular list. He had less seniority than Canales, who was the third most senior, but more than J. Victorian, who was the seventh most senior. The record shows that F. Victorian met the qualification requirements for the skilled list. He was qualified as a signal person, a checker, a power operator (forklift) and a hatch leader.

Canales, one of the two employees who the Respondent added to the skilled list in April 2014, served as a fill-in union steward on several occasions. However, that was the extent of the union activities shown for him. At the time he was selected for the skilled list in April 2014, Canales had the third most seniority of any of the regular list employees – less than Russell, but more than F. Victorian. He met the eligibility requirements for the skilled list because he was qualified as a signal person (for all types of cranes), as a checker, as a power operator (forklift), and as a hatch leader.

J. Victorian, the other employee who the Respondent added to the skilled list, has never been a union steward or union officer. Brown testified that he was not aware of J. Victorian ever having filed a grievance. At the time he was added to the skilled list, J. Victorian had less seniority than Russell, F. Victorian, or Canales. In addition, the evidence shows that he did not possess the qualifications required to be eligible for placement on the skilled list. The April 1, 2014, order of call shows that he was qualified as a crane operator,¹³ a power operator (forklift and endloader), and as a hatch leader. This gave him three areas of qualification for the skilled list – one short of the four that are necessary pursuant to the collective bargaining agreement. I reject the Respondent’s claim that J. Victorian was qualified as a signal person. See Brief of Respondent at Page 51. J. Victorian is listed as lacking the signal person qualification on all five of the order of call lists that the Respondent issued leading up to J. Victorian’s placement on the skilled list, as well as on the order of call lists issued subsequent to his placement on the skilled list. Joint Exhibit (J Exh.) C.¹⁴

D. Discipline and Eventual Termination of Russell

The complaint alleges that the Respondent discriminatorily disciplined Russell on April 23, June 30, and July 10, 2014, before discriminatorily terminating him on August 23, 2014. The record shows that Russell’s difficulties at the Respondent pre-dated these events. On October 23, 2012, the Respondent issued a verbal warning (in written form) to Russell in which it cited him for violating its cell phone/mobile device policy by using his cell phone while operating a forklift. This was before

Russell began serving either as a union dispatcher or as a fill-in union steward.¹⁵ On January 3, 2014, the Respondent issued a written warning to Russell, citing him for “insubordination, leaving the job, and failure to begin work promptly and/or return to work promptly from meal period.”¹⁶ Then, on March 5, 2014, the Respondent issued a written reprimand to Russell in which it cited him for sleeping while he was on a running forklift in one of the Respondent’s warehouses. In other words, before any of the discipline alleged to be unlawful in this case, the Respondent had disciplined Russell on at least three occasions. As I discussed in *Midwest I*, the record shows that Russell had a tendency to abandon his job duties without authorization and range around the facility. When located by the Respondent, he would sometimes resist orders to resume working.

1. April 23 Written Reprimand

On April 23, 2014, Hendricks, the Respondent’s operations manager, issued the first of the disciplinary actions alleged to violate the Act in this case. The discipline was a written reprimand citing Russell for, on April 22, driving a forklift through an area that was strewn with pig iron and through which there was no clear path of travel. The Respondent stated that Russell’s conduct violated the Respondent’s forklift safety policy,¹⁷ its equipment and vehicle policy,¹⁸ and the rule against “horseplay or other unsafe actions” that is appended to the collective bargaining agreement. The policies had been discussed with Russell a month earlier, and Russell testified that he knew he was not supposed to drive a forklift over pig iron. Pig iron chunks fall from cranes as a by-product of moving the material around the facility. Some of these pig iron chunks end up in areas through which forklifts and other equipment travel and unit employees are assigned to clear the material in order to avoid damage to such equipment. Witnesses estimated that the pig iron chunks could weigh as little as 3 pounds or as much as 40 pounds. Hendricks testified that if an operator drove a forklift over a piece of pig iron he would expect it to damage the forklift. Russell, however, while denying that he had driven the forklift through an area strewn with pig iron, also testified that he could have driven the forklift over the pig iron chunks involved here without damaging the forklift. Tr.(II) 95. It is not disputed that the forklift Russell was operating did not suffer damage on April 22.

I find that on April 22 Russell did, in fact, drive the forklift he was operating through an area that was littered with pig iron

¹³ He had the lowercase “cr” designation, meaning that he could operate the older cranes that the Respondent was phasing out, but not the new Liebherr cranes for which NCCCO certification was required.

¹⁴ It is important in this regard to distinguish between Joseph Victorian Jr. (the person whose skilled-list placement is at-issue here and who is referred to in this decision as J. Victorian) and Joseph Victorian Sr. Both individuals are listed on the April 1, 2013, order of call, and while Joseph Victorian Sr. is identified as a qualified signal person, Joseph Victorian Jr. is not.

¹⁵ At different times during his testimony, Russell set the time he began acting as a fill-in steward in November 2012 and November 2013. Tr.(I) 966 and 967. In either case, the October 23, 2012, discipline predates such service.

¹⁶ In *Midwest I*, the General Counsel alleged, but failed to prove, that the January 3, 2014, was discriminatory in violation of Section 8(a)(3) and (1).

¹⁷ The Respondent’s “Forklift Safety Guidelines #1450” directs forklift operators to “[a]void running over loose objects on the road surface.”

¹⁸ The Respondent’s “Equipment & Vehicle Policy #3000” prohibits employees from engaging in “mistreatment of equipment.” The policy states that violations “will result in a written reprimand” in the case of the first and second offenses, and “will result in termination” in the case of a third offense.

and through which there was no clear path of travel. Hendricks credibly testified that he witnessed this action and that he took a photograph of the area seconds after Russell traversed it. A copy of this photograph was introduced into evidence during the trial. (Jt. Exh. D and GC Exh. K.) The photograph shows that there was no clear path through the area due to the presence on the ground of debris that witnesses identified as pig iron chunks. Tire tracks from the forklift Russell was operating are visible in the photograph and show that Russell took a somewhat winding path through the area by means of which he generally managed to avoid running the forklift's tires over the larger pieces and more significant accumulations of debris in the area. The evidence also showed that the work that Russell had been directed to perform—and to which he was traveling when he drove through the area—did not require him to use the forklift. Hendricks informed Leach that he had seen Russell drive through the area and Leach discussed the matter with Russell that day.

Russell testified, contrary to Hendricks' testimony and to the above findings, that when he drove the forklift through the area it was not in the condition shown in the photograph or otherwise strewn with pig iron (Tr.(II) 88). I credit Hendricks' testimony on this point over Russell's. As discussed earlier, Russell is a particularly unreliable witness and a less reliable one than Hendricks. In addition, in this instance Russell's claim is undermined by an affidavit he gave to the Board in which he stated that on the day he was verbally chastised for driving his forklift through the area he took a photograph of Hendrick's photograph of the area. In the affidavit, he stated that he wanted a copy of the photograph because he was concerned that the Respondent "would put things that were not true in the write-up." (Tr.(II) 279.) Russell's photograph shows the area in the same condition as it is in the photograph taken by Hendricks that was admitted at trial and described above. It is implausible to me that Russell would make a copy of Hendrick's photograph for the reasons he stated if that photograph misrepresented the condition of the area in a way that was unfair to Russell. Indeed, Russell himself seemed to recognize this inconsistency when confronted with his affidavit during cross-examination, and he reacted, as he had a number of times in the past, by implausibly asserting that the written record misstated (he used the word "misinterpreted" in this instance) his prior testimony. (Tr.(II) 280.) In reaching my finding regarding Russell's conduct, I considered the fact that the forklift was not damaged. However, that does not outweigh the evidence showing that Russell drove through the area and that doing so created an impermissible risk of damage. The photograph indicates that Russell's weaving path through the area generally avoided the larger chunks and accumulations of pig iron, and Russell testified that one could drive over the chunks shown in the picture without necessarily causing damage (Tr.(II) 95).

2. Respondent's Cell Phone/Mobile Device Policy

All the other discipline at-issue in this case, including Russell's termination, was ostensibly based on Russell's violations of the prohibition on employees using their cell phones while operating equipment. The Respondent's 2014–2015 policy handbook includes policy number 3100, "Cell Phone/Mobile

Device." That policy states in relevant part:

Midwest Terminals of Toledo International, Inc. and Midwest Terminals, Inc. understand and appreciate that employees may need to utilize their cellular phones for business purposes. At the same time, cell phones and mobile devices are a distraction in the workplace.

Employees are responsible for operating Company-owned and potentially hazardous equipment in a safe and prudent manner, and therefore, employees shall refrain from using cellular phones while operating such vehicles. We recognize that other distractions occur while operating equipment; however, eliminating the use of cell phones while operating equipment is one way to minimize the risk of accidents for our employees. Therefore, you are required to stop the piece of equipment you are operating so that you can safely use your cell phone, and/or you shall request that the caller contact you at a better and safer time.

Cell phone use while operating equipment is prohibited.

To ensure the safety and effectiveness of operations, employees are asked to utilize cell phone for personal calls only during their break periods.

Employees who violate this policy will be subject to disciplinary actions, up to and including employment termination.

(Jt. Exh. B at page 20) (Emphasis in Original). This policy was provided to, and discussed with, Russell as part of the pre-season training in March 2014. Russell signed a form acknowledging that he had received the cell phone policy, but added a statement to this form in which he declared that he was "signing under protest." (R Exh. II.)

Rule #12, which is appended to the collective bargaining agreement, also bears on cell phone usage. That rule states: "Employees shall not carry and/or operate radios, tape recorders, televisions, cell phones, pagers, other distracting devices, or read while working." (Jt. Exh. 1.)¹⁹

Witnesses for both the General Counsel and the Respondent confirmed that the Respondent did not allow employees to use cell phones while operating equipment. These witnesses included Brown, Paul Floering, and Hubbard—all witnesses for the General Counsel, two of whom are union officials.²⁰ (Tr.(II) 316–317, 388–389, 452–453, 455–456.) Hubbard explained that if an employee receives a call while operating equipment and wants to answer it, the employee is required to shut off the equipment and step out of it. (Tr.(II) 339.) Despite the express language of the Respondent's cell phone policy, and the testimony of witnesses for both the Respondent and the

¹⁹ In addition, the record shows that Leach told Russell on numerous occasions not to use his cell phone to take photographs while working. The record does not show whether Russell had been operating equipment while using his cell phone in those instances, although one workplace video made by Russell was submitted at trial and reveals that he was, in fact, driving on equipment while he videotaped. The Complaint does not allege that Leach violated the Act on any of those occasions when he told Russell not to use his cell phone to take photographs.

²⁰ Brown is president of the Union, and Hubbard is a steward and former vice president of the Union.

General Counsel, Russell, incredibly, asserted at trial that he was allowed to use his cell phone while operating equipment. (Tr.(II) 252.) I do not credit Russell on this point, but rather find that his willingness to make such a statement under oath is further evidence of his unreliability as a witness.

The only employees, other than Russell, who were shown to have been disciplined for using their cell phones while operating equipment were Raymond Sims and F. Victorian. Sims, was the financial secretary of the Union and received a verbal warning for such conduct on August 31, 2012. F. Victorian received a verbal warning on June 10, 2014. The record does not show that any unit employees who were not involved in union activities had ever been disciplined for using cell phones while operating equipment. By the same token, the record does not show that there were, in fact, any cases in which the Respondent knowingly permitted such an employee to use a cell phone while operating equipment, much less that it refrained from issuing discipline in any instance when such usage led to a spill or other mishap. Brown and Hubbard, both of whom recognized the limits on cell phone usage at work, had never been disciplined on the basis of their cell phone usage even though they were significantly more active in the Union than was Russell. No one besides Russell received discipline beyond a verbal warning.

3. Respondent Disciplines Russell Citing Cell Phone Policy Violation on June 30

On June 30, 2014, Russell was assigned to operate a hopper that controlled the flow of bulk sugar into trucks. Jason Lowery, the Respondent's director of corporate development, was talking on the phone in a parked vehicle about 30 to 35 feet away when Russell was performing this task. Lowery testified that he noticed Russell open the gate of the hopper and then step away from the hopper controls, stop paying attention to the loading of the truck, and begin "messaging" with a cell phone or iPod that Russell removed from his overalls.²¹ Lowery testified that at about 11:30 a.m. he saw the sugar "pile up in the truck to the point where it was clear that it was going overflow the side of the truck." He honked his horn to alert Russell, and Russell turned around, and then closed the hopper, but not before six to eight inches of sugar had spilled onto the ground. Records of Russell's cell phone usage show that he had, in fact, received an incoming call at 11:26 a.m. that day. Later that day, Lowery told Hendricks and/or Blakely what he had seen and then provided the Respondent with a written account. I credit Lowery's account of what he observed based on his demeanor and the record as a whole. Lowery was not shown to be aware of Russell's union activities or to have any animus regarding those activities.

The next day, July 1, Leach and Hendricks met with Russell in the presence of union steward Hubbard. They discussed Russell's cell phone usage with him again. The record does not show that the Respondent imposed any type of discipline during this discussion. Subsequently, Russell informed the Respondent that he wanted to have something in writing regarding

²¹ Russell testified that he kept his personal cell phone in the chest pocket of his overalls when he was not using it.

the July 1 discussion and, on July 3, he approached Hendricks and asked to have a step one grievance meeting over what he characterized as the Respondent's harassment regarding his cell phone usage. Consistent with the Respondent's practice under the collective bargaining agreement, Hendricks referred Russell to Leach for the step-one meeting.²²

The Respondent subsequently issued a written reprimand to Russell, dated July 10, 2014,²³ that concerned the incident on June 30. It cited Russell for violating cell phone policy #3100 and collective bargaining agreement rule #12. The body of the written reprimand states:

On June 30, 2014 you were hired to operate the hopper during a sugar discharge. At approximately 11:30 a.m. on June 30, 2014, in violation of both Policy #3100 and CBA Work Rule 12, while distracted by your cell phone, you failed to close the hopper gate in a timely fashion resulting in overflowing the truck bed and spilling onto the ground on both sides of the truck.

As you are aware, both the CBA Work Rules and Policy #3100 were reviewed with you at the preseason meeting on March 22, 2014. As you are also aware, this is your second disciplinary issue with the cell phone usage. You previously received written documentation for a verbal warning on October 23, 2012. This letter will serve as a written reprimand and be placed in your personnel file in accordance with [the Respondent's] Progressive Disciplinary Policy #2000.

Going forward, if you fail to modify your behavior in this area (Policy #3100 and/or CBA Work Rule #12), you will be subject to further discipline up to and including termination.

The letter was signed by Leach.

4. Respondent Terminates Russell Citing Cell Phone Policy Violation on August 23, 2014

By letter dated August 23, 2014, the Respondent terminated Russell, citing him for yet another violation of the cell phone policy. On Saturday, August 23, Russell was assigned to work as a chute operator on the deck of a Canadian vessel. The chute was being used to load coal through a hatch and into a storage

²² I do not credit Russell's testimony that during the July 3 exchange, Hendricks responded by saying "shut up, zip it" or you will be "out of here." Tr.(II) 126. Hendricks specifically denied making this statement, Tr.(II) 697, and I credit him over Russell. As noted before, I considered Russell a particularly unreliable witness, and a less reliable one than Hendricks. Moreover, I note that Russell repeatedly, and in multiple contexts other than that of the July 3 meeting, accuses the Respondent's officials of threatening that he will be "out of here." See, e.g., Tr.(II) 113 (Russell reports Hendricks threatening that he will be "out of here" twice on July 1, 2014); Tr.(II) 153 (Russell reports that Leach says Russell is "out of here" multiple times on August 23, 2014). Moreover, Russell asserts that when Hendricks and Leach, on separate occasions said "out of here," he responded by asking "what" do you "mean" "I'm out of here?" Tr.(II) at 113 and 153. The repetitiveness of Russell's accounts regarding these separate events leaves me with the impression that his testimony is not an accurate report of what was said, but rather a product of his own invention.

²³ Russell testified that he did not actually receive this written reprimand until July 21, 2014.

hold. As chute operator, Russell was responsible for following the direction of a member of the vessel's crew regarding how much material should be loaded and where it should be loaded. The crew member directing Russell at the time was Jeremy MacDougall—the third officer of the vessel and an individual who was not affiliated with either the Respondent or the Union. Russell, in turn, communicated by radio with bargaining unit end loader operators who were out of Russell's earshot and, generally, out of his view. At Russell's direction, the operators would load buckets of coal onto a conveyer that carried the coal up to the chute where Russell would direct it into the hatch. Russell had a remote control that allowed him to move the chute higher and lower, and inboard (toward the mid-line of the ship) and outboard (toward the outer side of the ship). The control is about the size of a television remote control, but is considerably thicker and has a much simpler keypad. The control was attached to a rope, by means of which chute operators, including Russell, generally hung it around their necks.

On August 23 at between 8:10 and 8:15 a.m., a substantial amount of coal spilled onto the deck of the ship. The spill was about waist high at the edge of the hatch, and the loading operation was suspended during the time it took to clean up the spill. MacDougall and Russell gave conflicting testimony about how the spill occurred. MacDougall testified that the spill occurred because Russell was looking at his cell phone rather than attending to the chute or the flow of coal into the hatch, whereas Russell stated that the spill occurred because MacDougall shifted the ship. I consider MacDougall a more credible witness and credit his account. As noted above, MacDougall was an employee of a third party and the General Counsel has not forwarded any basis for concluding that MacDougall was a biased witness.

MacDougall credibly testified that he began work that morning at 8:00 a.m.—shortly before the spill. He stated that the hold that the coal was being loaded into was about 75 percent full at the time and that he was having Russell direct the material so as to balance the vessel's loads and fill some remaining space near one edge of a hatch. MacDougall testified that he was about five to ten feet away from the chute when he heard coal hitting the deck behind him. He turned around and saw Russell texting on a cellular device with his back to the operation. The chute that Russell was supposed to be operating had been positioned too far inboard, so that it was beyond that edge of the hatch. MacDougall yelled at Russell to put the chute back into the hatch. After this was done, MacDougall asked Russell why the chute had been out of the hatch, but Russell did not answer. MacDougall and the ship's chief engineer began to clean up the spill, and asked Russell for help, but Russell replied, "That's not my job."

Over the radio that Leach used to communicate with the vessel's crew, he heard MacDougall tell the vessel's first mate that Russell had been distracted by his cell phone and a had spill occurred. About 20 minutes after the spill occurred, Leach came up on the deck. Leach provided MacDougall with a piece of paper on which MacDougall wrote a statement regarding the spill. Leach escorted Russell off the vessel and also instructed the deckhands not to allow Russell to re-board. Sometime later that day, however, Russell came back to the vessel and man-

aged to convince the deckhands to allow him to return to the deck so that he could retrieve his gear. Once aboard, however, he did not retrieve his gear and leave, but rather stayed to relieve the employee who had replaced him as chute operator and resumed those duties himself. Upon returning to this work, Russell yelled at MacDougall for talking to Leach about him. Russell told MacDougall that he did not even own a cell phone. The ship's captain ordered Russell to leave the vessel, but Russell refused to do so until police officers arrived at the scene.

In addition to being supported by MacDougall's credible testimony, the above account is supported by the Russell's cell phone records, which the Respondent obtained and presented after Russell's initial testimony. As stated above, the spill occurred on August 23 between 8:10 and 8:15 a.m. Russell testified that he was not texting "that day," Tr.(II) 168, but the phone records show that Russell received a text on August 23 at 8:04 am, sent a response to that sender at 8:14 am, and received a text back from the same sender at 8:16 a.m. (R Exh. VV.) This means not only that Russell was texting "that day," but that he received a text message, responded to that text message, and received a reply during the period when the spill occurred and during which MacDougall testified that he observed Russell texting. I note, moreover, that the Respondent states that the phone number with which Russell exchanged these text messages between 8:04 and 8:16 a.m., was not associated with union business and the General Counsel has not claimed otherwise or asserted that Russell's texting was something other than personal.

As stated above, Russell would have me believe that he was not texting while operating the chute and that the spill was caused by MacDougall moving the vessel. I do not credit this testimony. Russell was an unreliable witness in general and, as regards the coal spill, his testimony was blatantly self-serving and contradicted by the records showing his cell phone usage that day. Russell's assertion that the spill occurred because the vessel was moved was contradicted by MacDougall's credible testimony on that point and the General Counsel did not present testimony from any credible witness who claimed that that the vessel moved at the time of the spill. I also reject the General Counsel's suggestion that MacDougall may have erroneously believed that Russell was texting because the "chute remote control is operated in the same manner that an individual sends a touch text using their cell phone." Brief of General Counsel at page 33. That suggestion is frivolous. First, the phone records show that Russell was, in fact, texting during the time period when the spill occurred. Second, MacDougall had been working with the Respondent's chute operators for several days and it is hard to believe that, from five or ten feet away from the chute, he would not have recognized the chute control for what it was. The record shows that the chute control is considerably thicker than a cell phone and has a simple keypad that does not resemble that of a cell phone. See General Counsel Exhibit Q (photograph of the keypad on the chute remote control). Lastly, MacDougall saw Russell with his back to the operation at the time the spill occurred. If Russell had been moving the chute using the remote at the time of the spill (and not texting on his phone) I expect that he would have been facing the chute to watch its movements, not looking in the

other direction.

On August 23, after Leach obtained MacDougall's account regarding the spill, Leach met with Russell and had Miguel Rizo, a former union steward, present as a witness. Leach told Russell to gather his things and leave. He told Russell that the reason he was being required to leave was "your phone again." Russell refused Leach's order to leave the facility but rather, as discussed above, returned to vessel and resumed working. While on the vessel he refused the order of the ship's captain to leave the vessel.

Leach made a decision to terminate Russell for using his cell phone in violation of the Respondent's policy on August 23. Leach instructed Blakely to prepare a termination letter and told him what the letter should say. Blakely prepared the letter on August 23 and the Respondent mailed it to Russell on Monday, August 25, the next business day. The letter, which was signed by Leach, stated the following in relevant part:

It is my duty to inform you of your termination of employment with Midwest Terminals of Toledo International, Inc. for violation of the Mobile Device Policy #3100 and Collective Bargaining Agreement Work Rule #12, effective immediately.

(GC Exh. G.) The General Counsel points out that, prior to making the termination decision, Leach did not interview either of the end loader operators whose work Russell was directing that day. However, the record suggests that those employees, who were working on the dock rather than aboard the vessel, would not have been in a position to observe what Russell was doing at the relevant time. The General Counsel itself did not choose to call either of those individuals to testify about the events surrounding the spill.

E. Complaint Allegations

The Complaint alleges that since about April 1, 2014, the Respondent has: violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by unilaterally changing the criteria for inclusion on the skilled list and by ceasing to meet to discuss and confer with the Union regarding the selection of employees for the skilled list; and violated Section 8(a)(3) and (1) of the Act by discriminatorily denying Russell and F. Victorian placement on the skilled list. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by discriminatorily disciplining Russell on April 23, 2014, June 30, 2014, and July 10, 2014, and terminating him on August 23, 2014. The complaint also alleges that since at least June 20, 2014, the Respondent has violated Section 8(a)(1) by disparately applying the cell phone/mobile device policy against employees who engaged in union activity.

III. ANALYSIS AND DISCUSSION

A. 8(A)(5) Allegations Related to Placement On Skilled List

The General Counsel alleges that, when the Respondent placed two individuals (Canales and J. Victorian) on the skilled list in April 2014, it violated Section 8(a)(5) and (1) by unilaterally departing from the selection criteria set forth in the collective-bargaining agreement and by unilaterally changing the established practice of meeting and conferring with the Union

in advance of such placements. Where, as here, employees are represented by a union, their employer violates Section 8(a)(5) and (1) of the Act by making a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Whitesell Corp.*, 357 NLRB 1119, 1171 (2011); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1164–1165 (1990); *Bethlehem Steel Co. (Shipbuilding Div.)*, 136 NLRB 1500, 1503 (1962). The method and criteria by which the Respondent selects regular list employees for elevation to the skilled list—which for all intents and purposes constitutes reassignment from part-time to full-time work—substantially, materially and significantly, affects unit employees' wages and hours and is a mandatory subject of bargaining. *Capitol Trucking, Inc.*, 246 NLRB 135 fn. 2 (1979) (change in method of distributing assignments is a mandatory subject of bargaining); see also *Antelope Valley Press*, 311 NLRB 459, 460 (1993) (assignment of work is a mandatory subject of bargaining). The employer's obligation to refrain from making unilateral changes to mandatory subjects of bargaining applies where, as here, the parties' existing agreement has expired and negotiations have yet to result in a successor agreement. *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015), citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Register-Guard*, 339 NLRB 353 (2003). In such circumstances the employer must continue to abide by established terms and conditions of employment until the parties either negotiate a new agreement or bargain to a lawful impasse. *Id.*

In this case, the Respondent unilaterally departed from both the criteria and procedure for selecting employees for addition to the skilled list. As noted above, the collective bargaining agreement provides that: (1) only persons who are qualified in four of the following five areas—crane operator, checker, power operator, signal man, and hatch leader—may be selected for the skilled list; and (2) seniority will be the deciding factor when choosing among employees whose qualifications are "relatively equal." In contravention of these criteria, when the Respondent placed two employees on the skilled list in April 2014, it selected one (J. Victorian) who not only did not meet the four out of five qualifications requirement, but also had less seniority than two employees (Russell and F. Victorian) who did meet the four out of five qualifications requirement and were passed over. Moreover, the other employee who the Respondent selected for placement on the skilled list in April 2014 (Canales) had less seniority than one employee (Russell) who was not selected even though both were qualified in four of the five areas. By departing from the placement criteria set forth in the collective-bargaining agreement, the Respondent failed to meet its bargaining obligation and violated Section 8(a)(5) and (1) of the Act.²⁴

²⁴ The Respondent claims, contrary to the record evidence and my findings, that it did not depart from the contractual selection criteria when it placed Canales and J. Victorian on the skilled list on April 27, 2014. Nevertheless, the Respondent claims that if it did change the criteria, the 6-month period for challenging that change had run before the Union filed the charge. See, *supra*, footnote 7 (Section 10(b) of the Act). The evidence shows, however, that the Union's September 5,

The evidence also shows that the Respondent unilaterally changed its practice regarding the participation of the Union in the selection process. As Blakely himself wrote “the past practice when filling vacancies on the Skilled List . . . consistently employed by the company is to seek the Union’s input prior to filling a Skilled List vacancy.” Blakely stated that this had been true continuously since before April 23, 2010. However, when the Respondent filled vacancies on the skilled list in April 2014, it did so without seeking the Union’s prior input or even giving the Union advance notice of its intention. By unilaterally eliminating that step at the time it filled skilled list vacancies in April 2014, the Respondent significantly changed the method for selecting employees for the skilled list, a mandatory subject of bargaining, see *Capitol Trucking, Inc.*, 246 NLRB at 135 fn.1, and failed to bargain in good faith in violation of Section 8(a)(5) and (1).²⁵

I conclude that the remedy in this case should include make whole relief for both Russell and F. Victorian relating to the Respondent’s failure to place them on the skilled list in April

2014, charge was filed well-within the 6-month period following the Respondent’s departure from the contractual criteria on April 27, 2014. At no time prior to that did the Respondent ever inform the Union that it was changing the selection criteria or invite the Union to bargain regarding such a change. This is not surprising given the Respondent’s consistent position, even as of the time of trial, that it *did not* change the selection criteria. Moreover, the Respondent has not shown that at any time prior to April 2014 it placed employees on the skilled list without following the contractual selection criteria. The Respondent claims that, despite its consistent position that it never changed the selection criteria, the Union should have recognized that it was, in fact, changing the selection criteria as of September 16, 2013, if not earlier. It points to a September 16 letter in which Blakely informed the Union that only Canales was eligible for the skilled list. This letter, which was sent at a time when the Respondent was not actually adding, or even proposing to add, anyone to the skilled list, makes no mention of the Respondent changing the selection criteria and does not explain the specifics of the selection criteria it was applying or the basis on which it was claiming that Canales, but not others, were eligible. The letter does not even mention Russell and F. Victorian. Not only that, but a couple of weeks later, on September 30, the Respondent expressed a contradictory position regarding eligibility, stating in writing that *no one* at the facility was eligible for placement on the skilled list. Tr.(II) 613. Given the above, I reject the contention that, based on the September 16 letter, the Respondent had notified the Union of the change in selection criteria that the Respondent has persistently denied that it made. *Register-Guard*, 339 NLRB 353, 356 (2003) (“The 10(b) period commenced only when the Union had clear and unequivocal notice of those violations.”).

²⁵ It appears that the Respondent may also be raising a Section 10(b) timeliness defense with respect to the unilateral change it made by ending its established practice of consulting with the Union prior to adding employees to the skilled list. I conclude that the defense is not established here. The Respondent did not deviate from the established practice until April 2014, when it, for the first time, added employees to the skilled list without seeking the Union’s prior input. It could not have deviated from that practice in 2012 or 2013 because it did not add employees to the skilled list during that period. The last time, prior to April 2014, when it added an employee to the skilled list was in July 2011 – at which time it followed the existing practice of first discussing the matter with the Union. It never gave the Union prior notice, much less the required clear and unequivocal notice, that it was changing the practice. *Register-Guard*, supra.

2014. In reaching this conclusion, I considered the fact that the Respondent only placed two employees on the skilled list at that time, and that Russell and Canales both had more seniority than F. Victorian. However, the Respondent has not asserted that it would have limited its selections to two employees if it had not improperly disqualified F. Victorian from consideration.

B. 8(A)(3) and (1) Allegations Related to Placement On Skilled List

In addition to claiming that the Respondent violated its bargaining obligations when it placed employees on the skilled list in April 2014, the General Counsel claims that the Respondent’s selections discriminated against Russell and F. Victorian in violation of Section 8(a)(3) and (1). The Respondent denies this allegation and claims that Russell and F. Victorian were ineligible for placement on the skilled list because they lacked the requisite qualifications. Pursuant to the Board’s *Wright Line* decision, in cases alleging a violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent’s decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activity, and (3) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink’s, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014); *Camaco Lorain Mfg. Plant*, supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

In this instance the General Counsel has met the first two elements of its *Wright Line* burden with respect to both Russell and F. Victorian. As of April 2014, Russell was engaging in protected union activities by serving as a fill-in steward, a union dispatcher, a union trustee, and a member of the union safety committee. He filed grievances and raised concerns about safety and potential contract violations with the Respondent. The record shows that the Respondent was aware of many of Russell’s activities on behalf of the Union. With respect to F. Victorian, the evidence shows that he was an elected union steward, the Union’s financial secretary, and a union trustee. He filed grievances and challenged the Respondent regarding contract violations. The record shows that the Respondent was aware that F. Victorian was engaging in activities on behalf of the Union.

With respect to F. Victorian, the General Counsel has also shown animus towards the protected activity. When F. Victorian challenged Leach over a highly contentious issue regarding the Respondent's assignment of Longshoremen's unit work to Teamsters-represented employees, Leach raised his voice and warned F. Victorian, "I'm about this far off your ass." This threatening language demonstrates animus that satisfies the last element of the *prima facie* showing with respect to F. Victorian. Since the General Counsel has succeeded in making the required initial showing under *Wright Line*, the burden shifts to the Respondent to show that it would have denied F. Victorian placement on the skilled list even if he had not engaged in protected activity. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. I find that the Respondent has failed to meet its responsive burden. The Respondent's defense is based on the contention that F. Victorian was not selected because he did not meet the eligibility criteria. As discussed above, the record shows that, contrary to the Respondent's contention, F. Victorian was qualified in four areas—signal person, checker, power operator and hatch leader—and was therefore eligible pursuant to the agreement. Moreover, rather than select F. Victorian, the Respondent chose an employee—J. Victorian—who not only did not meet the contractual eligibility requirements, but also had less seniority than F. Victorian.

For the reasons discussed above, I find that the Respondent discriminated against F. Victorian in violation of Section 8(a)(3) and (1) when, in April 2014, it passed him over for placement on the skilled list.

With respect to Russell, I find that the General Counsel has failed to demonstrate that the Respondent harbored animus towards him based on his union activity. In reaching this finding, I considered that the record, including the record that was consolidated from *Midwest I*, shows that the Respondent was hostile towards specific protected activities that Brown, Hubbard, and F. Victorian engaged in to support the Union. That animus was largely directed at those employees' actively challenging managers regarding the unlawful assignment of Longshoremen's unit work to Teamsters-represented employees.²⁶ Moreover, Brown was the most notable union activist at the facility and Hubbard was close behind. I find that the record does not, however, show that the Respondent bore animus based on employees simply being members of, or holding positions with, the Union. The record does not establish that the Respondent bore animus towards any of the union activities that Russell engaged in. The General Counsel notes that Russell brought safety and purported contractual violations to the Respondent's attention. However, the record suggests that such discussions between employees and management were routine at the facility, and does not show that, in the case of Russell,

those discussions were heated or otherwise suggestive of employer animus. See, supra, footnote 11. The General Counsel also points out that, on multiple occasions when Russell was taking pictures while working, Leach told him to stop doing so. However, the General Counsel did not show either that Russell's picture taking on those occasions was union activity or that Leach knew it was. The Complaint does not allege, and the General Counsel has not shown, that Leach's statements to Russell on the subject violated the Act. This is not to say that the Respondent, and in particular Leach, bore no animosity towards Russell. Rather the evidence indicates that, to extent Leach was hostile towards Russell, that hostility was the result of Russell's persistent misconduct and poor performance, rather than of any union activity he engaged in.

Since the General Counsel has failed to meet its initial burden under *Wright Line*, with respect to the Respondent's failure to place Russell on the skilled list in April 2014, the claim that the action was the result of anti-union animus in violation of Section 8(a)(3) and (1) should be dismissed.

C. 8(a)(1) Allegation Regarding Application of Cell Phone/Mobile Device Policy

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by selectively and disparately applying its cell phone/mobile device policy against employees who formed, joined, or assisted the Union. Disparately applying work rules by disciplining only those engaged in union activities is a violation of the Act. *Richmond Times-Dispatch*, 346 NLRB 74, 76 (2005), enfd. 225 Fed.Appx. 144 (4th Cir. 2007), cert. denied 552 U.S. 990 (2007).

The General Counsel has failed to demonstrate that the Respondent disparately applied its cell phone policy against employees who formed, joined, or assisted the Union. The General Counsel bases its contention that the policy was disparately applied on the fact that the only three employees who were shown to be disciplined under the policy—Russell, Sims, and F. Victorian—had all engaged in some degree of union activity at the facility. However, the record showed that the Respondent disciplined Russell for violating the policy for the first time in October 2012, before Russell was shown to have engaged in any notable union activities.²⁷ The General Counsel failed to show, moreover, that the Respondent treated any employees more leniently than it treated Russell, Sims, or F. Victorian. The record does not show a single instance when the Respondent failed to discipline a unit employee who it knew had violated the policy. Certainly it does not show that such leniency was shown to any employee who refrained from union activity.

I note, moreover, that Russell was the only employee shown to have received discipline beyond a verbal warning for using his cell phone while operating equipment. Other employees, including Brown and Hubbard (both of whom who were considerably more active in union affairs than was Russell) never received any discipline at all under the cell phone policy. In-

²⁶ Russell testified that, in one instance, Brown directed him to tell the unit employees to cease work in response to the Respondent assigning unit work to Teamsters-represented employees. Russell's claim was not corroborated by others. Assuming that, in one instance, Russell followed Brown's direction to tell the employees to cease work, the record as a whole still indicates that Russell was not a meaningful player, or viewed as such, regarding the assignment of work to the Teamsters.

²⁷ Russell began acting as a fill-in steward in November of either 2012 or 2013, and was made a union dispatcher on November 6, 2013. The evidence does not show when Russell became a trustee or safety committee member or that he was particularly active in the Union prior to November 2012.

deed, both Brown and Hubbard confirmed that they knew the Respondent did not allow employees to talk on their cell phones while operating equipment. No credible witness suggested that this facially common sense restriction was not reasonable or necessary.²⁸ Only Russell made the implausible claim that he was allowed to use a cell phone while operating equipment. When, in March 2014, the Respondent distributed copies of the longstanding written policy expressly prohibiting employees from using their cell phones while operating equipment, Russell signed the policy “under protest,” and then persisted in violating it. In summary, the policy at issue in this case is a facially common sense safety precaution directed at preventing employees from becoming distracted by cell phones while operating longshoremen’s equipment. Other employees, including union activists, accepted the restriction and were never disciplined for violating it. Russell was the only employee shown to have repeatedly violated the policy. His resulting inattentiveness led to two cargo spills. Russell was repeatedly disciplined pursuant to the policy because he repeatedly violated it, not because the policy was disparately applied.

I find that the General Counsel has not established that the Respondent violated Section 8(a)(1) by disparately applying its cell phone/mobile device policy. That allegation should be dismissed.

D. 8(a)(3) and (1) Allegations Regarding the Discipline and Termination of Russell

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) when, between April and August 2014, it disciplined and ultimately discharged, Russell. For the reasons discussed above in the portion of this decision that addresses the allegation that the Respondent discriminatorily refused to place Russell on the skilled list, the General Counsel has failed to establish that the Respondent bore animus against Russell based on his protected union activities. Moreover, with regards to the specific disciplinary actions at issue here, the General Counsel has not shown disparate treatment or other factors demonstrating such animus. Since the Respondent has failed to satisfy its initial *Wright Line* burden with respect to the discipline and eventual discharge of Russell, its claim that those actions resulted from discrimination in violation of Section 8(a)(3) and (1) should be dismissed.

Even assuming that I had found that the Respondent bore animosity towards Russell based on his union activities, a violation would still not be shown since the Respondent has met its responsive *Wright Line* burden by showing that it would have taken the same disciplinary actions if Russell had not engaged in protected activity. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The first of the challenged disciplinary actions was the written reprimand that Hendricks issued to Russell on April 23 for driving a forklift over an area that was strewn with pig iron and through which there was no clear path of travel. That conduct violated

the Respondent’s forklift safety policy, equipment vehicle policy, and collective bargaining agreement rule against unsafe actions.²⁹ Instead, the General Counsel argues that the Respondent did not adequately investigate the incident by interviewing Russell before imposing discipline. See *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004) (failure to inquire of the disciplined employee as to “what had occurred constituted a rush to judgment attributable to Respondent’s unlawful motivation to take adverse action against the leading prounion employee on the premises”), enfd. 165 Fed. Appx. 435 (6th Cir. 2006). In this instance, however, the official who imposed the discipline—operations manager Hendricks—personally witnessed Russell risk injury to person and equipment by driving through an area strewn with pig iron. Moreover, just seconds after witnessing this misconduct, Hendricks took a picture of the area to memorialize its condition. Russell’s assignment at the time did not require him to use the forklift at all, much less justify his driving the forklift through an unsafe area. Given that Hendricks himself caught Russell in the act, I do not agree that Hendricks’ failure to further investigate the matter before imposing discipline is suspicious or undermines the evidence showing that Russell was disciplined for legitimate reasons.

The General Counsel also contends that the Respondent has not met its burden because it did not show that it had disciplined other employees for similar misconduct when, like Russell, their misconduct did not result in damage. This contention would be persuasive if the evidence showed that the Respondent knew that other similarly situated employees engaged in the same or similar misconduct and treated them more leniently than Russell. Since the record does not show that any other employees violated those policies under comparable circumstances, the fact that the Respondent did not discipline anyone else for doing so does not call the Respondent’s explanation into question. What we do know is this. Russell risked damage to a forklift by driving it through an area that was strewn with pig iron chunks. He did this at time when his assignment did not require use of the forklift. The Respondent’s equipment and vehicle policy requires that a written reprimand be issued the first time an employee mistreats equipment. That is exactly the penalty that Hendricks imposed on Russell for mistreatment of the forklift. Moreover, under the Respondent’s equipment policy, the penalty could have been more severe. That policy, in addition to stating that the offending employee *will* receive a written reprimand, also provides that the Respondent may impose additional discipline, including disqualification from equipment, payment of damages, and termination of employment. None of that additional discipline was imposed here. Thus, although Russell’s offense was arguably less severe than it might have been had damage resulted, it is also true that the discipline he received was less severe than it might have been. Based on the above, and the record as a whole, I find that the Respondent has shown that it would have issued the written reprimand to Russell on April 23 based on his mistreatment of

²⁸ The General Counsel does claim that the policy itself unlawfully interfered with employees’ union activities. Rather it claims only that the purportedly disparate application of the policy was unlawful.

²⁹ The General Counsel does not appear to dispute that such conduct runs afoul of those provisions. It does, however, contend that Russell did not engage in the conduct. For the reasons discussed in the findings of fact, I credit Hendrick’s testimony that Russell did so.

the forklift even if Russell had not engaged in union activity. Thus if I assume, contrary to my findings, that the General Counsel has made a prima facie showing of unlawful discrimination, a violation would still not be established because the Respondent has met its responsive burden under *Wright Line*.

The record also leads me to find that the Respondent would have disciplined Russell in July 2014 and ultimately discharged him on August 23, 2014, based on his continued violations of the prohibition on the use cell phones while operating equipment, regardless of his union activity. As previously discussed in the portion of this decision that addresses the Section 8(a)(1) claim based on the allegedly disparate application of the policy, the record shows that the cell phone policy was not disparately applied against Russell or anyone else because of their union activities. Russell was the only employee who the record shows repeatedly violated the prohibition. The first time he did so, in October 2012, was before he became a fill-in steward or union dispatcher and the Respondent issued a verbal warning to him. The second time that Russell violated the rule was on June 30, 2014. In that instance his misconduct caused a spill of cargo at the facility. The Respondent reacted to this offense by talking to Russell on July 1 about his cell phone usage,³⁰ and then presenting him with a written warning, dated July 10, 2014, for violating the cell phone policy again. The written warning reminded Russell that he had previously received a verbal warning for violating the cell phone policy in October 2012, and warned: “[I]f you fail to modify your behavior in this area (Policy #3100 and/or CBA Work Rule #12), you will be subject to further discipline up to an including termination.” Even this did not deter Russell from continuing to flout the policy against cell phone usage while operating equipment. On August 23—6 weeks after the date of the written warning—Russell violated the prohibition again. This time his misconduct resulted in a more substantial cargo spill. Russell’s misconduct and responsibility for this accident was reported to the Respondent by MacDougall—an unbiased, third-party, witness. Consistent with the warning in the July 10 disciplinary notice, the Respondent discharged Russell at that time. Although the discharge notice references only Russell’s misconduct relating to cell phone usage, the Respondent’s failure to grant him additional leeway is particularly understandable given the spills that resulted and Russell’s other recent offenses, which included sleeping on the job, insubordination, abandonment of job duties, and misuse of equipment. Based on these facts, and the record as a whole, I credit Leach’s testimony that he would have disciplined, and on August 23, 2014, terminated, Russell for violating the cell phone policy even if Russell had not engaged in protected union activities. Thus, had I found that the record established antiunion animus against Russell, and that the General Counsel made a prima facie showing of unlawful discrimination, the Respondent would nevertheless have met its rebuttal burden by showing that it would have disciplined and

discharged Russell as it did even if he had not engaged in union activities.

For the reasons discussed above, I find that the allegations that the Respondent discriminatorily disciplined Russell on about June 30 and July 10, 2014, and discriminatorily terminated him on August 23, 2014, in violation of Section 8(a)(3) and (1) should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Longshoremen’s Association, Local 1982, AFL–CIO, (the Union, or the ILA, or the ILA local) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act in April 2014 by departing from the selection criteria set forth in the collective bargaining agreement when it added employees to the list of skilled employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act in April 2014 by unilaterally discontinuing the established practice of meeting with the Union to discuss and confer before selecting employees to add to the list of skilled employees.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily denying F. Victorian placement on the list of skilled employees in April 2014.

6. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I order the Respondent to provide Russell and F. Victorian with make whole relief for losses those employees suffered as a result of being unlawfully denied placement on the skilled list in April 2014. The make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf’d. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons*, 283 NLRB 1173 (1987) and compounded daily as required by *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accordance with *Tortillas Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent must compensate Russell and F. Victorian for any adverse tax consequences of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. I note that the record shows that F. Victorian is deceased. His backpay period is therefore limited to the period from April 2014 when he was unlawfully denied placement until the date of his death. *United States Service Industries*, 325 NLRB 485, 487 (1998), enf’d. 72 F.3d 920 (D.C. Cir. 1995). The backpay due F. Victorian shall be paid to the legal administrator of his estate or to any person authorized to receive such payment under applicable law. Id. In addition, Russell’s backpay period is limited to the period between April

³⁰ The General Counsel alleges that the Respondent issued a verbal warning to the Respondent on June 30 or July 1. The Respondent did not issue a verbal warning or any other type of discipline at that time. The only discipline issued with respect to the June 30 violation was the July 10 written warning.

2014, when the Respondent denied him placement on the skilled list in violation of Section 8(a)(5), and August 23, 2014, when the Respondent terminated him for reasons that have not been shown to be unlawful.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.³¹

ORDER

The Respondent, Midwest Terminals of Toledo International, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying placement on the skilled list to any employee for engaging in protected union or concerted activity.

(b) Departing from the selection criteria set forth in the collective-bargaining agreement (CBA) in effect between the Respondent and the International Longshoreman's Association, Local 1982, AFL-CIO (the Union) for choosing employees to be added to the list of skilled employees.

(c) Unilaterally changing the established practice of meeting with the Union to discuss and confer before selecting employees to add to the list of skilled employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the criteria set forth in the CBA when selecting employees for addition to the list of skilled employees.

(b) Meet with the Union to discuss and confer before selecting any employees for addition to the list of skilled employees.

(c) Before implementing any changes to the process for adding employees to the list of skilled employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees of the bargaining unit described in the CBA.

(d) Make Don Russell and Fred Victorian Jr. whole for any loss of earnings and other benefits suffered as result of the Respondent's failure to place them on the list of skilled employees in April 2014.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."³² Copies of the notice, on forms provided by the

Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2014.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 19, 2016.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny you placement on the list of skilled employees because you engage in protected union or concerted activity.

WE WILL NOT depart from the selection criteria set forth in our collective bargaining agreement with the International Longshoreman's Association, Local 1982, AFL-CIO (the Union) when selecting employees to be added to the list of skilled employees.

WE WILL NOT unilaterally change the selection process for adding employees to the list of skilled employees.

WE WILL NOT in any like or related manner interfere with, re-

³¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

strain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, when selecting employees for addition to the list of skilled employees, adhere to the selection criteria set forth our collective bargaining agreement with the Union.

WE WILL meet with the Union to discuss and confer before selecting employees for addition to the list of skilled employees.

WE WILL notify and, on request, bargain with the Union before making any changes to the process for selecting employees to be added to the list of skilled employees.

WE WILL make Don Russell and Fred Victorian Jr. whole for any loss of earnings and other benefits suffered as a result of unlawfully denying them placement on the list of skilled employees in April 2014.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-135971 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

